MAINE SUPREME JUDICIAL COURT SITTING AS THE LAW COURT

LAW COURT DOCKET NUMBER: Pis-24-424

State of Maine v. Terri Moulton

ON APPEAL FROM THE UNIFIED CRIMINAL COURT PISCATAQUIS

BRIEF OF APPELLANT TERRI MOULTON

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Defendant was initially charged by Complaint on or about April 25, 2022. (Appendix [hereinafter App.] at 3). A warrant was issued for Defendant, and the same warrant was executed on or about April 25, 2022. (App. 3) The Defendant had an initial appearance scheduled on or about April 28, 2022. (App. 3) On or about June 30, 2022, Defendant was Indicted by the Piscataquis Grand Jury. (App. 5). The Defendant was charged with one count of Theft by Unauthorized Taking, Class B, 17-A M.R.S. §353(1)(B)(1) and one count of Forgery, 17-A M.R. S. §703(1)(A-1)(1). (App. 20). Both charges mentioned a series of dates between January 1, 2019 and February 28, 2022. (App. 20). Both charges also mentioned a value of more than $10,000.00. (App. 20). Defendant was arraigned on or about July 11, 2022 and she plead not guilty. (App. 5).

The case was originally set for a dispositional conference for a date in July, 2022. (App. 5). A dispositional conference was held on or about September 19, 2022. (App. 6). Another dispositional conference was held on or about December 19, 2022. (App. 6). A Judicial settlement conference was also held on this matter on or about January 9, 2024 (App. 7). That

same conference did not result in settlement (App. 7). The case was eventually set for trial on or about July 22, 2024 and a trial was held over the course of four days. (App. 9-12).

In between dispositional conferences, various pre-trial motions were filed including a Motion for Discovery (Motion to Compel Discovery) on or about December 19, 2022. (App. 6). A hearing on that motion was not held, however the motion was marked as withdrawn on or about January 30, 2023. (App. 6).

A trial was held over the course of a number of days in July of 2024, beginning on or about July 22, 2024. (T.T. Day 1). At the start of the case, Defense counsel requested the trial Judge recuse himself as he had a former professional and personal relationship with the attorney representing the State in this matter. (Trial Transcript Day 1, [hereinafter T.T.] at 3). More specifically, the Defendant through counsel moved for the trial judge to recuse himself based upon the fact that the Judge had been employed by the District Attorney's office for a number of years and also that the Judge had been Deputy District Attorney under Christopher Almy, attorney representing the State in this matter. (T.T. Day 1, 3-4). The court denied that Motion. (T.T. Day 1, 4).

During the course of the trial, Defendant, through counsel, raised the issue of electronic passwords that the Defendant needed to access in order to evaluate the testimony. (T.T. Day 1, (T.T,. Day 1, 4-18) (T.T. Day 2. 6-12). Despite the Defendant pointing out she had not received these passwords and that her position was that she and her expert needed them to get a fair trial, the court found alternatively that the request was not timely or in the alternative that there was not a discovery violation, and proceeded with the trial. (T.T. Day 1, 18) (T.T. Day 2, 12)

Additionally, Defendant through her attorney made various motions for a mistrial and numerous objections during the trial including objections during both the State's closing arguments and rebuttal. (T.T. Day 4, 22, 33,). The court denied the Defendant's requests for a mistral. (T.T. Day 4, 22-23, 33). On or about July 25, 2024, the Jury found the Defendant guilty of both charges. (App. 12). Sentencing was not conducted on that date, and was later conducted on or about September 16, 2024. (App. 12).

Defendant filed a timely notice of appeal. (App. 24).

III. STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The State's attorney made various statements during opening, closing and rebuttal arguments which were improper under the Maine and Federal constitutions. Under Maine law when a defendant objects at trial, this court reviews the comments for harmless error and will affirm the conviction if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *State v. Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473 (Me. 2012); M.R.U. Crim. P. 52(a). The State has the burden of persuasion on appeal in a harmless error analysis. *State v. Nightingale*, 2023 ME 71, ¶ 27, 304 A.3d 264, 272–73 (Me. 2023). Harmful error is error that affects the "criminal defendant's substantial rights," see *State v. Pabon*, 2011 ME 100, ¶ 34, 28 A.3d 1147, (2011) meaning that "the error was sufficiently prejudicial to have affected the outcome of the proceeding," Id. When a defendant does not object to the State's argument, this court reviews for obvious error. *State v. Penley*, 2023 ME 7, ¶ 22, 288 A.3d 1183, 1192 (Me. 2023).

The Defendant made a motion for the trial Judge to recuse himself based upon his prior relationship and employment with the District Attorney's office and his prior professional relationship with the prosecutor representing the State in this matter. This court reviews decisions on motions to recuse for an abuse of discretion. *Mathiesen v. Michaud,* 2020 ME 47 ¶ 9, 229 A.3d 527, 531 (Me. 2020). Under the abuse of discretion standard, this court uphold decisions unless they are made without a rational explanation, inexplicably depart from established policies, or rest on an impermissible basis. Any error of law is, inherently, an abuse of discretion. *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752 (Me. 2019).

There were numerous violations of the Maine Rules of Criminal Procedure which denied the Defendant her rights to a fair trial. When a defendant contends that a violation and the court's response to it violated his or her right to a fair trial, this court reviews the trial court's "procedural rulings to determine whether the process struck a balance between competing concerns that was fundamentally fair." *State v. Poulin*, 2016 ME 110, ¶ 28,

Cumulatively, the errors which were made in the case deprived the Defendant of a fair trial.

IV. ARGUMENT

A. The Prosecutor's Statements In Closing Were Error and not Harmless Error

A criminal defendant has a right to a fair trial, which is protected by the United States and Maine Constitutions. U.S. Const. amends. VI, XIV, § 1; Me. Const. art. I, § 6. *State v. Poulin*, 2016 ME 110, ¶ 25, 144 A.3d 574, 580 (Me. 2016). Under this court's primacy approach, when an appellant raises a claim under both the Maine Constitution and the United States Constitution, this court will address the claim under the Maine Constitution first. *State v. Athayde*, 2022 ME

41, ¶¶ 20-21, 277 A.3d 387 (Me 2022). If the state constitutional provision provides the relief sought by the defendant, then there is no federal violation. *Id*. ¶ 21.

There are specific types of statements that a prosecutor should avoid making in the jury's presence. *State v. Dolloff*, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1045 (Me. 2012). Existing case law enumerates several types of statements made by a prosecutor, or defense counsel, that will almost always be placed into the category of "misconduct," including the following:

• Misrepresenting material facts in the record or making statements of material fact unsupported by any evidence, *see, e.g., United States v. Gentles,* 619 F.3d 75, 81 (1st Cir.2010); *United States v. Azubike,* 504 F.3d 30, 38 (1st Cir.2007); *United States v. Joyner,* 191 F.3d 47, 53–54 (1st Cir.1999); *State v. Gould,* 2012 ME 60, ¶ 17, 43 A.3d 952 (Me. 2012).

• Using the authority or prestige of the prosecutor's office to shore up the credibility of a witness, sometimes called "vouching," *see State v. Williams,* 2012 ME 63, ¶ 46, 52 A.3d 911;

• Shifting the burden of proof on an issue to the defendant, *see United States v. Glover,* 558 F.3d 71, 76–79 (1st Cir.2009);

• Making statements pandering to jurors' sympathy, bias, or prejudice, *see State v. Burgoyne,* 452 A.2d 393, 396–97 (Me.1982);

• Injecting personal opinion regarding the guilt or credibility of the accused or other witnesses, *see State v. Schmidt,* 2008 ME 151, ¶¶ 16–17, 957 A.2d 80; and

• Making unfounded and inflammatory attacks on the tribunal or opposing counsel, . *State v. Dolloff*, 2012 ME 130, ¶ 42

Although this is not an exhaustive list, it encompasses many of the types of statements that will likely constitute prosecutorial misconduct in a criminal trial. In each instance, the core element of the offending statement is that it urges or encourages the jury to make its decision based on *State v. Dolloff*, 2012 ME 130, ¶ 42

If the defendant objected at trial, this court reviews the prosecutor's comments for harmless error. *State v. Osborn*, 2023 ME 19, ¶ 21, 290 A.3d 558, 566 (Me. 2023). This court will affirm the conviction if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *State v. Cheney*, 2012 ME 119, ¶ 34; M.R.U. Crim. P. 52(a). When a defendant does not object to the State's argument, this court reviews for obvious error. *State v. Penley*, 2023 ME 7, ¶ 22. This court reviews claims of prosecutorial error "in the overall context of the trial." *State v. Ayotte*, 2019 ME 61, ¶ 13, 207 A.3d 614 (Me. 2019).

"[T]he State has the burden of persuasion on appeal in a harmless error analysis." *State v. Nightingale*, 2023 ME 71, ¶ 27. Harmful error is error that affects the "criminal defendant's substantial rights," see *State v. Pabon*, 2011 ME 100, ¶ 34, meaning that "the error was sufficiently prejudicial to have affected the outcome of the proceeding," Id. (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).[1] This court reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Begin*, 2015 ME 86, ¶ 25, 120 A.3d 97, 103 (2015).

This Court determines the effect of error by looking to the totality of the circumstances, including the severity of the misconduct, the prosecutor's purpose in making the statement (*i.e.*,

[1] When a trial has been infected by prosecutorial error, we are free to require a new trial based on our supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated. *State v. White*, 2022 ME 54, ¶ 35.

whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions." *State v. Dolloff*, 2012 ME 130, ¶ 33, 58 A.3d 1032 (Me. 2012). This court review serious instances of prosecutorial error cumulatively and in context. See *State v. Dolloff*, 2012 ME 130, ¶ 74, (citing to article I, section 6-A of the Maine Constitution.) When a trial has been influenced by prosecutorial error, this court may require a new trial based on its supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated. *State v. White*, 2022 ME 54, ¶ 35, 285 A.3d 262 (Me. 2022).

By statute and rule, federal appellate courts vacate judgments only if the error at trial affects a party's substantial rights, i.e., the error at trial was not harmless. 28 U.S.C.S. § 2111 (LEXIS through Pub. L. No. 117-214); Fed. R. Crim. P. 52(a). Under both Maine and federal law, there are two types of trial errors: (1) those that are structural, in which prejudice is presumed, triggering vacatur; and (2) those that are nonstructural, triggering an analysis as to the impact of the error in that specific case. See *State v. Burdick*, 2001 ME 143, 782 A.2d 319 (Me. 2001). (differentiating between structural and nonstructural defects and stating that examples of structural errors include a total deprivation of the right to counsel at trial and the lack of an impartial judge)). *State v. White,* 2022 ME 54 ¶ 32.

In *State v. Woodard*, 2013 ME 36, ¶¶ 34–36, 68 A.3d 1250 (Me. 2013), this court found it was plain error for a prosecutor to urge the jury to "send a message" as such and argument would divert the jury from its duty to decide the case on the evidence." In that same case, this court observed prosecutor's "efforts must be tempered by a level of ethical precision that avoids

overreaching and prevents the fact-finder from convicting a person on the basis of something other than evidence presented during trial"; *State v. Woodard*, 2013 ME 36, ¶ 34-36.

In *State v. Begin*, this court specifically concluded that error occurred when the prosecutor requested that the jury hold the defendant "accountable" for violating a protective order and for his other actions. 2015 ME 86, ¶¶ 6, 27-28, 120 A.3d 97, (Me. 2015). There the court found the State's exhortation that the jury hold Begin 'accountable' improperly suggested to the jury that it had a civic duty to convict or that it should consider the broader societal implications of its verdict, and thereby detracted from the jury's actual duty of impartiality. *State v. Begin*, 2015 ME 86, ¶ 27.

Pursuant to article I, section 6-A of the Maine Constitution, this court reviews serious instances of prosecutorial error cumulatively and in context.

> "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *See Dolloff*, 2012 ME 130, ¶ 74, 58 A.3d 1032

As a representative of an *impartial* sovereign the prosecutor's duty to ensure that a criminal defendant receives a fair trial must far outweigh any desires which may exist to achieve a successful track record of convictions. *State v. Collin*, 441 A.2d 693, 697 (Me. 1982); *see also State v. Young*, 2000 ME 144, ¶ 6, 755 A.2d 547 ("As we have noted previously, prosecutors are held to a higher standard regarding their conduct during trial because they represent the State, and because they have an obligation to ensure that justice is done, as opposed to merely ensuring that a conviction is secured." (citations omitted)). *State v. White*, 2022 ME 54, ¶¶ 38-40.

In *State v. Osborn*, 2023 ME 19, ¶ 24, this court found that a prosecutor's statements could be viewed in isolation when the same prosecutor improperly appealed to social norms. In that case, this court observed, it has "long criticized prosecutors' appeals to public perception or other social issues that go beyond the evidence produced at trial, *State v. Osborn*, 2023 ME 19, ¶ 23. However, in that case, because the comment was isolated and did not frame the trial from beginning to end, the error was not significant enough to effect the Defendant's substantial rights. S*tate v. Osborn*, 2023 ME 19, ¶ 25.

More recently in *State v. White*, this court again observed that suggestions to hold a defendant "accountable" in an opening statement were improper and constituted error. *State v. White,* 2022 ME 54 ¶ 23-24. In that matter it was significant that court also found numerous errors including comments during the State's opening statement, which were also problematic, ultimately finding that error which were not isolated but framed the trial from its beginning to its closing deprived the Defendant of a fair trial. *State v. White,* 2022 ME 54 ¶ 403-44.

In the present case, the attorney for the State made at least two separate statements in closing which were likely improper and amounted to more than harmless error. (T.T. Day 4, 22, 33,). Defendant's counsel objected to both of those statements in a timely manner. (T.T. Day 4, 22, 33,). In regards to the first comment, the attorney for the State made addressed the Defendant's choice to exercise her constitutional right to have a trial. (T.T. Day 4. 22). More specifically the attorney for the State said:

> ". . . Now, you might —this is something might you might want to be thinking about, well, Mr. Almy, why are we —the defendant in this case confessed why are we having a trial? We need to understand that we need to respect the process. Everybody is entitled to have a trial . . . .we are having a trial, the defendant is entitled to a trial, we are not

> disparaging that, despite the evidence that shows on different occasions that she admitted what happened, and we will talk about that." (Id.).

Defendant's counsel immediately objected and moved for a mistrial. (T.T. Day 4, 22-23). Counsel's objection addressed the fact that the attorney for the State was insinuating that the Defendant did not actually have the right to a trial. (T.T. Day 4, 23.). Ultimately, the trial justice denied the motion for a mistrial, instead volunteering the court would later give a corrective instruction. (T.T. Day 4, 23-4). Not insignificantly, the trial Justice noted that the State's attorney should "carefully stay away from any insulation that she doesn't have a right. "(Id.). The trial justice further noted he would not comment on "whether (the State's attorney) did or did not" insinuate Defendant did not have a right to a trial. (Id.).

In regards to the second comment, the attorney for the State addressed punishment. (T.T. Day 4. 33). More specifically, the attorney for the State said:

> "Your job is to decide what the facts show an then take the fact as you find them and apply to the verdict that he gives you —excuse, apply it to the law, then come to a verdict, so he you gives you the law, you take the facts and you make a decision. Now one of the things you are not here to do is decide what punishment there is, if any, punishment is up to this learned presiding justice. . . . " (T.T. Day 4, 33).

Again, counsel for Defendant objected. (T.T. Day 4, 33). This objection was overruled without further discussion or comment. (Id.).

In the first instance, the attorney for the State did more than just question the Defendant's right to a trial. The implication of the prosecutor's statements were that a confession would somehow deprive the Defendant of the right to a trial. The prosecutor then went on to state that he was not disparaging the Defendant exercising her rights, however the clear implication of the prosecutor's remarks was intended for the exactly opposite effect to the jury. In fact, the

statement that the Defendant had a right to trial which was not being disparaged was a suggestion to the jury that the Defendant was wasting the jury's time by having a trial, that the Defendant was guilty and the trial was some type of formality, with a foregone conclusion. To the extent that this was not a comment on the Defendant's right to trial, it certainly conveyed the prosecutor's personal opinion regarding the case.

In the second instance, the prosecutor mentioned punishment. Setting aside the statements which were made which seemed to indicate Defendant had somehow waived her right to a trial, the discussion of punishment went beyond the evidence in the case or the use of wit or humor, and again confirmed the prosecutor's personal opinion regarding the Defendant's guilt. Stated another way, the mention of punishment, even when bracketed with the phrase "if any" injected the prosecutor's personal opinion into the process.

Standing alone, these two errors were sufficiently prejudicial to have affected the outcome of the proceeding. However, there were additional errors in rebuttal which were also sufficiently prejudicial that they also had an effect on the outcome of the trial.

B. The Prosecutor's Statements in Rebuttal were Error and not Harmless Error

Not insignificantly, during rebuttal the prosecutor focused on trust and a betrayal of trust stating:

> They trusted her (T.T. Day 4, 87) . . . Just imagine that you are being relied on and being trusted an sit right there and not say anything that's sad. . . . That's really really sad, that's a betrayal. (T.T. Day 4, 88).

After rebuttal, Defense counsel objected to comments made by the prosecutor and moved for a mistrial. (T.T. Day 4, 89-91). The objections focused on the prosecutors statements which

highlighted a lack of testimony, a personal attack on the defendant and also mentioned that the closing and rebuttal were *not a fair commentary on the evidenc*e. (Id.). Defense counsel referenced these statements saying there were numerous occasions where the prosecutor's stamens had "gone over the line." (Id.). The court stated the prosecution had not, in the court's view said anything:

> ". . . that would comment on Ms. Moulton's decision not to testify or shift the burden of proof which would be the sort of argument that would give you a position for a mistrial and I did not hear those in his comments." (T.T. Day 4, 92).

However, the objection was larger than just those two issues and questioned whether the closing was a fair commentary on the evidence.

The prosecutor's statements indicate that the prosecutor was at some level appealing to the Jury's sympathies and social norms, at least twice in rebuttal, not addressing the evidence but focusing on trust and betrayal. The prosecution could have pursued another strategy during closing and rebuttal, instead the prosecutor chose to make the statements that the case was about trust and betrayal. Again, these errors were sufficiently prejudicial to have affected the outcome of the proceeding.

C. Additional Statements Made by the Prosecutor Which Were Not Objected to Were Error and Obvious Error.

During opening statements, the prosecutor also mentioned trust and betrayal:

> …they trusted her. (The defendant). They trusted her. As the case develops folks, your are going to realize that starting in 2019, this Defendant betrayed that trust betrays that trust, thats what their case is about, trust and betrayal. (T.T. Day 1, 29).

Later in his opening statement, the prosecutor also stated:

> This is a serious case. It is called betraying the trust that that family put in the defendant (T.T. Day 1, 35)

During closing the prosecutor also stated:

> …the scale of this theft is huge you know something, folks it is outweighed, outweighed only by one thing, by the magnitude of this defendants betrayal of the trust that Keith Dewitt and his family put in her thats what this case is about folks. betrayal of trust (T.T. Day 4, 43)

Again, as discussed above, these statements made the case less about the evidence, about the standards required to prove the crime or the burden of proof and went instead to concepts of morality, such as trust and betrayal. Since these statements were made in opening and closing along with the other statements which were made in this case, collectively all of the prosecutor's statements amounted to suggesting that the verdict in this matter was as much about a moral decision regarding trust and betrayal as it was about facts and evidence. Again, these errors were sufficiently prejudicial to have affected the outcome of the proceeding.

D. The Trial Court Erred in Denying the Defendant's Motion to Recuse.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary; shall avoid impropriety; and should avoid the appearance of impropriety. M. Code Jud. Conduct R. 1.2. A judge shall not... convey or permit others to convey the impression that any person or organization is in a special position to influence the judge. M. Code Jud. Conduct R. 1.3. A judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." M. Code Jud. Conduct R. 2.11(A)(1). See also *Matter of Nadeau*, 2018 ME 18, ¶ 14, 178 A.3d 495, 499 (Me. 2018). In deciding matters, judges should be viewed by the general public to be

"wholly free, disinterested, impartial and independent." *State v. Marden*, 673 A.2d 1304, 1308 (Me.1996). But, "[a]bsent a showing that the trial judge ... could not be impartial, or reasonably be seen to be impartial, because of particular information . . . . [a party's] mere belief that [the] judge might not be completely impartial is insufficient to warrant recusal." *Mathiesen v. Michaud,* 2020 ME 47 ¶ 13.

This court reviews decisions on motions to recuse for an abuse of discretion. *Mathiesen v. Michaud*, 2020 ME 47 ¶9. Under the abuse of discretion standard, this court uphold decisions unless they are made without a rational explanation, inexplicably depart from established policies, or rest on an impermissible basis. Any error of law is, inherently, an abuse of discretion. *State v. Hussein*, 2019 ME 74, ¶ 10.

At the beginning of the trial, Defendant, through counsel moved for the trial Judge to recuse himself from the proceedings. (T.T. Day 1, 3-4). The basis of the Motion to Recuse was the Judges prior employment with the District Attorney's office and specifically the fact that the Judge had been employed with Mr. Almy, the prosecuting attorney, at the District Attorney's office for a number of years and at one point been the Deputy District Attorney for the same office. (T.T. Day 1, 4). The Judge stated that he had not had personal relationship with Mr. Almy since he left the District attorneys office. (T.T. Day 1, 4). The court denied the motion stating it could handle the case fairly and without bias. (T.T. Day 1, 4).

Given the Defendant's position, it was important that the court avoid the appearance that the trial Judge was not wholly free, disinterested, impartial and independent. In the present matter, it appears that the Judge was a former employee of the District Attorney's Office, and a direct employee of Mr. Almy and at one point his Deputy District Attorney. While the Judge

may have believed he could handle the case fairly and without bias that was likely not the appropriate legal analysis and therefore an abuse of discretion.

In fact, it would likely be a surprise to the general public that a presiding Judge was allowed to rule on matters where the attorney representing the State was both the Judge's former boss and supervisor. Recent or not, a continuing professional relationship such as the one mentioned by the trial Judge would likely give the general public a valid and clear reason to doubt the impartiality of the Judge. The Judge's decision to go forward would likely not, to an outside observer have promoted public confidence in the process or the independence, integrity, and impartiality of the judiciary or the process generally. Even while conceding that Maine is populated with small towns and there are always some contacts people will have in rural areas, there was no requirement that this Judge was required to go forward under these circumstances. Certainly the court could have considered placing a different Judge who had no connection to either the prosecutor's office or the defendant's attorney on the case. There were numerous other judges who had worked on the case, who had not worked for the District Attorney's office in the same prosecutorial district, including Justice Stewart. (App. 9).

Ultimately, the court did not apply the correct standard in denying the Motion to Recuse and abused its discretion.

E. The Lack of Disclosure of Certain Financial Records and the Court's rulings regarding the same ultimately denied Defendant a right to a fair trial.

Maine Rule of Unified Criminal Procedure 16 requires the State to produce, through automatic discovery, "[a]ny reports or statements of experts, made in connection with the

particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons." Pursuant to M.R.U. Crim. P. 16(a)(2)(G).... The defendant may make a written request of the State for materials beyond those required to be produced as part of automatic discovery. M.R.U. Crim. P. 16(c)(1). If the State objects to that request, the defendant can file a motion asking the court to order the State to provide the additional discovery. M.R.U. Crim. P. 16(d)(2). *State v. Lowery,* 2025 ME 3, ¶ 26, 331 A.3d 268, 277 (Me. 2025). Pursuant to M.R.U. Crim. P. 16(c)(2)(c) if the State is not in possession of the requested materials, the State needs to respond to requests "within a reasonable time."

Pursuant to M.R.U. Crim. P. 18(b), "[c]ounsel and unrepresented defendants must be prepared to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution." *State v. Mullen,* 2020 ME 56, ¶ 20, 231 A.3d 429, 434 (Me. 2020). Undermining the purpose of the Criminal Rules can lead to sanctions. S*tate v. Mullen,* 2020 ME 56, ¶ 21.

A court has broad discretion in deciding what sanction, if any, is appropriate when the State violates a rule of criminal procedure. See *State v. Townes*, 2019 ME 81, ¶ 13, 208 A.3d 774 (Me. 2019). This court reviews the trial court's determination for an abuse of discretion. Id. "We will not characterize a trial court's decision not to impose [a certain] sanction[ ] as an abuse of discretion or an error of law unless the defendant has shown that he was in fact prejudiced by the ... violation and that the prejudice rose to the level of depriving him of a fair trial." *State v. Gould,* 2012 ME 60, ¶ 24, 43 A.3d 952 (Me. 2012). "When a defendant contends that a ... violation and the court's response to it violated his or her right to a fair trial, we review the trial

court's procedural rulings to determine whether the process struck a balance between competing concerns that was fundamentally fair." *State v. Poulin*, 2016 ME 110, ¶ 28,

During the course of the case, Defendant's attorney had filed a motion requesting additional discovery. (App. 6). More specifically, there had been a Motion to Compel Discovery filed on or about December 19, 2022. (T.T., Day 1, 13, App. 6). There had been a request for unlocked copies of the electronic Quickbooks records for the alleged victims' financial records. (T.T, Day 1, 6). During the course of the case, Defense counsel had engaged an expert, Attorney Rebecca Carrier to review the financial records. (T.T. Day 1, 5).

On the first day of trial, when Defense counsel raised the issue that he was not provided with some of the materials he needed to prepare a defense, the trial Judge initially stated that the Defense motion was untimely as the Motion to Compel had been previously withdrawn. (T.T, Day 1, 13). However, Defense counsel pointed out that the Motion was withdrawn only after the District attorney's office stated it would provide the requested material. (T.T, Day 1, 14). The Prosecutor denied ever stating he would turn over the same records. (T.T. Day 1, 15).

During the course of these discussions with the court, the Defense conceded it was provided with copies of voluminous financial records. (T.T. Day 1, 6). However, none of the information which was provided was in electronic form addressing the request for access to electronic backup copies of bookkeeping software. (T.T. Day 1, 6). Instead of printed copies, what had been requested were electronic Quickbooks records with passwords so the records could be sorted and reconciled by the Defendant's expert. (T.T,. Day 1, 6). More specifically, the defense strategy was for the Defendant's expert to determine what expenses were run though the

business and how they might have been modified to reflect certain business expenses or conform with contemporaneous or later tax filings alleging fraud. (T.T. Day 1, 6).

A second issue was that there had been a ransomware attack. (T.T. Day 1, 6). In turn the ransomware attack which meant that the Quickbooks records had at some point been recreated. (T.T. Day 1, 6-8). A comparison to see what the records looked like before and after recreation was of primary importance to the defense. (T.T. Day 1, 6-7). Though the information regarding a password was requested, the passwords were not provided. (T.T. Day 1, 6-7)

On the first day of trial, the court indicated its view, that Defense counsel, when he did not get the required passwords, should have filed an additional motion to compel, but nonetheless the trial was going to proceed. (T.T. Day 1,18). On the second day of the trial, when Defense counsel again raised the issue of missing discovery and the Defendant's inability to get a fair trial and the information which was needed, the court suggested that since the passwords were not in the possession of the State that there was not a discovery violation. (T.T. Day 2, 12).

While conceding that there had been requests for this information, including a Motion to Compel the court also did not address how without these records, the Defendant had the ability to be "prepared to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution." pursuant to M.R.U. Crim. P. 18(b). Due to the arguments on this point both the first and second mornings of trial, it was clear that the defense position was the requested discovery was still outstanding even the morning of trial.

Given the trial Court's observation that the Motion to Compel was not docked as being withdrawn until January 30, 2023, the record established the information requested was not turned over prior to two dispositional conferences. Without the requested information it would

have been impossible for Defense counsel to comply with M.R.U. Crim. P. 18(b) and be prepared to engage in manful discussion regarding the all aspects of the case. . .”

Secondly, while recognizing that there had been a Motion to Compel and numerous discussions about the requested discovery between the District Attorney and Defendant’s counsel, the court’s specific finding that there was not a discovery violation did not address the requirements of various different rules of discovery including M.R.U. Crim. P. 16(d)(2), and M.R.U. Crim. P. 16(c)(2)(c).

Pursuant to M.R.U. Crim. P. 16(d)(2), when the Defendant filed her Motion to Compel discovery, the rule required a reply within 7 days of the filing of the Motion to Compel which was filed on or about December 19, 2022. The record is devoid of the filing of such a reply in that timeframe. (see App. 6). Additionally, both the record and the trail transcripts are devoid of the District Attorneys office having provided the written response required under the rules within the seven day time frame. (See T.T. Day 1, 2). Furthermore, the trial transcripts are clear that the State did not provide a written response stating it was not going to provide the Quickbooks password information until January 19, 2024, more than two years after the filing of the Motion To Compel.

Alternatively, under M.R.U. Crim. P. 16(c)(2)(c) the State’s communication that it was not going to provide the information requested was required to be provided “within a reasonable time.” Given that the original Motion was filed during December of 2022, a letter from the DA’s office on January 19, 2024, (T.T. Day 1, 14) multiple years later was likely not provided “within a reasonable time” under the rules.

At no point did the court suggest that a continuance was appropriate and no matter the objection, the court chose to go forward with the trial. (T.T. Day 1, 18, T.T. Day 2, 12). Ultimately, the court's procedural rulings to did not strike a balance between competing concerns that were fundamentally fair. At the very least, the court could have continued the case for even a few days to resolve the issues of the outstanding discovery. It did not, and given the gravity of the charges what took place was not fundamentally fair.

F. Considered cumulatively, the errors rendered defendant's trial unfair.

For the sake of this argument only, defendant assumes that the Court has found that none of the errors she has demonstrated above alone justifies vacating the conviction. This argument nonetheless asks the Court to consider the cumulative effect of those errors, as, together, they denied her a fair trial, in violation of the Fourteenth Amendment. See *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021).

V. CONCLUSION

The combination of the Prosecutor's statements, during opening, closing and rebuttal, in combination with the trial Judge's denial of the Motion to Recuse and the issues surrounding the Quickbooks passwords denied Defendant a fair trial.

DATED at Fort Kent, ME, this 15th day of April 2025 /s/ Neil J Prendergast

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CERTIFICATE OF SERVICE

I, Neil J. Prendergast, Esq., hereby certify that, on this date, I have caused copies of the foregoing Brief of Appellant to be sent electronically to:

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Bangor, ME 04401

DATED at Fort Kent, ME, this 15TH day of April 2025 **/s/** *Neil J Prendergast*

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